



For a thriving New England

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May 11, 2018

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Michael Cardente
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Patricia Thompson, Chair, Town Council
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

Nathaniel J. Tupper, Town Manager
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

Mr. Jagger, Mr. Cardente, Ms. Thompson, and Mr. Tupper:

This letter constitutes notice pursuant to 40 C.F.R., Part 135 and 33 U.S.C. § 1365(b) of the Conservation Law Foundation's (CLF)¹ intention to file suit against Allen Jagger ("Mr. Jagger"), Michael Cardente ("Mr. Cardente"), and the Town of Yarmouth, Maine ("Yarmouth") (collectively, "Defendants") in United States District Court for the District of Maine seeking appropriate injunctive and declaratory relief, and other relief no earlier than 60 days from the postmark date of this notice letter. CLF intends to file suit for violations of the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act"), 33 U.S.C. §§ 1251 *et*

¹ CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around Maine for, among other things, fishing, recreation, boating, scenic, aesthetic and scientific purposes. CLF's members live along or near the Royal River and in or near the Royal River watershed, and use and enjoy the Royal River for recreational, aesthetic, and/or scientific purposes, including fishing and enjoying wildlife in and around the Royal River. The interests of CLF's members are adversely affected by Defendants' alleged violations of the Clean Water Act set forth herein.

seq., specified below. CLF will file suit pursuant to Section 505(a) of the Clean Water Act, *id.* § 1365(a).

The subject of this action is a dam located on the Royal River in Yarmouth, Maine, known as the “Bridge Street Dam.” The town of Yarmouth owns both the Bridge Street Dam and its fishway. The Bridge Street Dam is associated with the property located at 81 Bridge Street (known as the “Old Sparhawk Mill”), which Mr. Jagger co-owns, and for which Mr. Cardente is the property manager.

A hydroelectricity generation project (“Hydro Project”) has historically been contained within the basement of the Old Sparhawk Mill, powered by a penstock diverting water from the Bridge Street Dam to turn the turbines. The Hydro Project is permitted by the U.S. Federal Energy Regulatory Commission (“FERC”) pursuant to an Order Granting Exemption from Licensing of a Small Hydroelectric Project of 5 Megawatts or Less issued in 1985 (FERC Project No. P-8417-ME) (“Exemption”). The current holder of the Exemption is Mr. Jagger, and Mr. Cardente is the primary contact for FERC communications regarding the Hydro Project.

As part of the FERC licensing process, pursuant to the Clean Water Act, the Maine Department of Environmental Protection (DEP) issued a water quality certification for the Hydro Project in 1984 (“§ 401 Certification”), attached hereto as Exhibit A. Defendants are not complying with the terms of the § 401 Certification. Specifically, the fishway at the Bridge Street Dam is not operational, in violation of the § 401 Certification. Further, the Bridge Street Dam does not maintain the minimum flow levels required by the § 401 Certification. Under the Clean Water Act, the terms of the water quality certification are also conditions of the Exemption. *See* 33 U.S.C. § 1341(d). As holder of the Exemption and owner of the Hydro Project, Mr. Jagger has violated and continues to be in violation of the Clean Water Act. As manager of the Exemption and the Hydro Project, Mr. Cardente has violated and continues to be in violation of the Clean Water Act. As the owner and operator responsible for the maintenance of the fishway and the Bridge Street Dam which are in violation of the § 401 Certification, the town of Yarmouth, Maine has violated and continues to be in violation of the Clean Water Act.

STATUTORY BACKGROUND

The Clean Water Act protects the nation’s waters by establishing a framework for the regulation of discharges, discharges of pollutants, and quality standards for surface waters. Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress established the “national goal” of achieving “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water[.]” *Id.* Thus, the Clean Water Act controls more than just the “discharge of pollutants” into the water; it also addresses “pollution” broadly defined as “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* §§ 1362(19), 1251(a); *see also S.D. Warren*

Co. v. Me. Bd. Of Enviro. Protect., 547 U.S. 370, 384 (2006).

Section 401(a) of the Clean Water Act requires an applicant for a federal license to first obtain a state certification of compliance with applicable water quality standards and effluent limitations. Specifically, any applicant for a federal license or permit to conduct an activity that may result in any discharge into navigable waters must provide the federal licensing or permitting agency with a certification from the state in which the discharge originates. 33 U.S.C. § 1341(a). Certifications under § 401 “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” that the applicant’s discharges and other activities will comply with all applicable state water quality standards and effluent limitations. *Id.* § 1341(d). Each of the requirements of the certification under § 401 “shall become a condition on any Federal license or permit subject to the provisions of [section 401].” *Id.*

Violators of the Clean Water Act are subject to enforcement actions initiated by citizens in addition to enforcement actions brought by EPA and states. *Id.* §§ 1319, 1365(a). Section 505(a) of the Clean Water Act authorizes citizen suits “against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.” *Id.* § 1365(a). Section 505(f) defines “effluent standard or limitation under this chapter” to include, *inter alia*, “certification under section 1341 of [the Clean Water Act].” *Id.* § 1365(f)(5). The Clean Water Act defines “person” to include, *inter alia*, an individual, corporation, partnership, association, or municipality. *Id.* § 1362(5). Citizens are required to provide sixty days’ notice of any alleged violations prior to commencing suit. *Id.* § 1365(b); 40 C.F.R., Part 135.

Under the Federal Power Act, 16 U.S.C. §§ 791-828(c), FERC issues licenses for the construction, operation and maintenance of dams for the development of power from streams and other bodies of water over which FERC has jurisdiction. 16 U.S.C. § 797(e). In certain circumstances, FERC is authorized to provide qualifying dams with exemptions from the licensing requirements instead. *See, e.g., id.* §§ 823a(a) & (b), 2705. Such dams are not wholly exempted from regulation, however. While dams may be exempted from application of Part I of the Federal Power Act, they are still subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by FERC.

Releases from hydroelectric dams have regularly been interpreted to constitute “discharges” of water under the Clean Water Act. Thus, FERC-jurisdictional dams releasing into waters of the United States are subject to the Clean Water Act § 401 certification provisions. The terms of any applicable § 401 certification become conditions of the FERC license or exemption by operation of law. 33 U.S.C. § 1341(d).

FACTUAL BACKGROUND

The Bridge Street Dam is located on the Royal River within the town of Yarmouth, Maine. The Royal River’s headwaters are in Sabbathday Lake in New Gloucester, Maine, and the river

travels 32 miles to reach the head-of-tide in Yarmouth, over the course of which it drops nearly 300 feet. The Royal River watershed encompasses approximately 140 square miles.

Historically, the Royal River provided spawning habitat for Atlantic salmon, shad, and river herring. Damming of the Royal River began in the second half of the seventeenth century, and by the early 1800s, there were 14 mills located along the Royal River in the town of Yarmouth alone. In 1958, more than ten fish barriers were identified within the Royal River watershed.

Beginning in the 1970s and through the early 1990s, the Maine Department of Marine Resources (“DMR”) engaged in fish restoration efforts within the Royal River. Primary emphasis was placed on restoration of alewife and American shad runs. The stocking and monitoring programs showed some promise but ultimately proved to be of limited success. For instance, although transplanted adult American shad successfully reproduced throughout the Royal River system as evidenced by out-migrating juvenile fish in the fall of 1978, the Bridge Street Dam presented a barrier to adult fish attempting to return to their spawning waters upriver in the spring. Records show that only one adult shad was captured in the Bridge Street Dam fishway trap traveling upstream in 1981. Meanwhile, stocking efforts with respect to alewife were variable -- records indicate that alewife runs initially increased as a result of the stocking efforts to more than 50,000 ascending adults in 1981, but dropped by about half between 1982 and 1983, and significantly decreased to less than 10,000 by 1988. No blueback herring were ever recorded passing through the Bridge Street fishway. DMR has not recently engaged in counting fish returns or in stocking these species in the Royal River.

Today, the Bridge Street Dam is one of only two remaining dams on the main stem of the Royal River in Yarmouth. Constructed in 1894, the Bridge Street Dam is located approximately 2.2 miles upriver from the mouth of the river at Casco Bay and roughly 200 to 250 feet upstream from the Bridge Street bridge. It is a run-of-river type structure, spanning the full width of the Royal River and measuring approximately 275 feet in length. It is constructed of masonry and reinforced concrete and is 10 to 12 feet in structural height. The Dam’s spillway is located at the center of the Dam and is approximately 75 feet long.

The town of Yarmouth has owned the Bridge Street Dam since 1973. In 1974, as part of DMR’s fish restoration efforts, DMR contracted with the town of Yarmouth for construction of a Denil-type fishway on the Bridge Street Dam. DMR maintained a lease to operate and manage the fishway until 1999, when the terms of the 25-year lease expired and were not renewed. The fishway is located on the west side of the Bridge Street Dam. It has a vertical rise of approximately twelve to thirteen feet and is three feet wide. There is a fish screen intended to prevent fish and aquatic life from entering the intake area. Water flow into the fishway is controlled by a vertical lift gate. The gate was severely damaged in 2010, and on information and belief, is not currently operable. The fishway does not appear to be actively managed or maintained, or to have been actively managed or maintained since the expiration of DMR’s lease nearly twenty years ago.

The town of Yarmouth also owns the right-of-way and flowage rights associated with the Bridge Street Dam. In the 1980s, Yarmouth leased flowage rights to the owners/managers of the Old Sparhawk Mill to enable generation of electricity in the lower level of the building. The site was rehabbed with new turbine-generators, a new penstock to divert water from the dam and to the Hydro Project, and other repairs. At the time of development of the Hydro Project, Thomas L. Yale and P. Andre LeMaistre filed an application to FERC seeking an exemption. On May 24, 1985, FERC issued the Exemption, subject to certain conditions. The Exemption was subsequently transferred to Mr. Allen Jagger. Mr. Jagger is the current holder of the Exemption and is the co-owner of the Old Sparhawk Mill and of the Hydro Project. Mr. Cardente, property manager of the Old Sparhawk Mill, is the primary contact for FERC regarding the Exemption and the Hydro Project.

Yarmouth no longer maintains a lease agreement with the owners or managers of the Old Sparhawk Mill regarding rights associated with the Bridge Street Dam. Although the penstock is still present, it is not clear whether the Old Sparhawk Mill still contains generating equipment, and if so, to what extent the Hydro Project remains operational.

STANDARDS OR LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

Section 401 of the Clean Water Act required the Hydro Project to receive a water quality certification from DEP ensuring that the Hydro Project would comply with Maine's water quality standards, effluent limitations and other limitations before the Hydro Project could receive its FERC Exemption. 33 U.S.C. § 1341. DEP issued the § 401 Certification on November 28, 1984. The § 401 Certification sets forth ten mandatory conditions necessary to ensure compliance with Maine water quality standards. Each term and condition of the § 401 Certification is a condition of the Exemption by operation of law. *Id.* § 1341(d).

The § 401 Certification acknowledges that the Hydro Project “could result in significant harm to fish and wildlife resources unless a) water levels and flows are adequate to maintain the aquatic environment, b) adequate upstream and downstream fish passage facilities are provided, and c) adequate measures are taken to control erosion and sedimentation during and following project construction.” To ensure that the Hydro Project did not result in significant harm to fish resources, DEP approved the application for the Hydro Project subject to the following conditions, *inter alia*:

Except as irreconcilably limited by order of state, local or federal authorities, and commencing with project construction, an instantaneous minimum flow of 50 cfs, or a flow equal to inflow when such inflow is less than 50 cfs, shall be maintained from the dam at all times, except that for the periods from May 1 to July 15 and September 1 to November 30 annually, an instantaneous minimum flow of 70 cfs,

or a flow equal to inflow when such inflow is less than 70 cfs, shall be maintained from the dam. First priority to a flow of 13 cfs shall be provided to the fishway. . .

Fish passage facilities for screening downstream migrating fish from the intake structure and for excluding upstream migrating fish from the tailrace channel shall be constructed and shall be operational with the commencement of project operation . . .

Defendants are in violation of the Clean Water Act because the fishway associated with the Bridge Street Dam is not “operational,” as required by the § 401 Certification. Defendants have also violated, and continue to violate, the minimum flow requirements set forth in the § 401 Certification, in violation of the Clean Water Act.

ACTIVITY ALLEGED TO CONSTITUTE VIOLATIONS

Defendants have repeatedly violated and are reasonably likely to continue to violate the § 401 Certification and the Clean Water Act by failing to maintain an operational fishway associated with the Bridge Street Dam. The fishway is not “operational” as required by the § 401 Certification and the Exemption due to Defendants’ failure to maintain and actively manage the fishway.

The Bridge Street Dam fishway requires regular maintenance and management to ensure effective performance. Flow levels must be managed by manual operation of control gates that control the release of water through the fishway. Debris like rocks, branches and accumulated trash must be removed. The Denil baffles in the fishpass require regular upkeep.

Defendants are failing to actively manage, operate or maintain the fishway. Inadequate operation as well as the need for maintenance have been documented since at least 2008, and have rendered the fishpass entirely inoperable during some migratory seasons. It is not presently known whether the headgate, which was damaged by flooding in 2010, is now fully operational. Nor is it known whether reported broken and missing boards in the fishway have been fixed. The current condition of the fishway does not facilitate effective fish passage. As a result of Defendants’ failure to manage or maintain the fishway, it is not operational as required by the § 401 Certification and the Exemption.

Further, Defendants have repeatedly violated and are reasonably likely to continue to violate the § 401 Certification and the Exemption by failing to maintain an instantaneous minimum flow of 50 cfs, or a flow equal to inflow when such inflow is less than 50 cfs, at all times, and by failing to maintain an instantaneous minimum flow of 70 cfs for the periods from May 1 to July 15 and September 1 to November 30, with first priority to providing a flow of 13 cfs to the fishway, in violation of the Clean Water Act.

It is not clear whether anyone is currently managing flow levels over the Bridge Street Dam. Yarmouth no longer maintains a lease with the owners or managers of the Old Sparhawk Mill regarding flowage rights associated with the Bridge Street Dam, yet Yarmouth does not appear to have assumed management responsibilities. It is critical that the flow levels are actively managed to ensure compliance with the § 401 Certification. The Bridge Street Dam substantially impacts the hydrology of the Royal River downstream when the penstock diverts water from the spillway, impacting the velocity, quantity, and location of flow below the Bridge Street Dam.

The flow into the fishway itself is also critical to successful passage of fish. The flow into the fishway must be managed by a manually-operated lift gate that was rendered inoperable due to flooding in 2010. The current status of the lift gate is not known; however, it does not appear that any of Defendants have been regularly operating it to ensure proper flow levels are maintained. Flows that are too high can result in impassable conditions, while flows that are too low can also prevent effective fish passage.

Defendants have violated the minimum flow levels on numerous occasions. These violations have occurred both before and after the installation of automated flow management equipment in 2012. Unless Defendants take action to actively manage flow levels, there is a continuing likelihood of recurrence of these violations, intermittently or sporadically.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Mr. Jagger and Mr. Cardente are persons, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. By operation of law, the terms and conditions of the § 401 Certification are conditions of the FERC Exemption. Mr. Jagger holds the Exemption and owns the Hydro Project. Mr. Cardente is the primary contact regarding the Exemption and on information and belief, manages the Exemption and the Hydro Project. Mr. Jagger and Mr. Cardente are therefore responsible for ensuring compliance with the Exemption and the § 401 Certification, which includes the requirements for operational fish passage and maintenance of minimum flow levels. Mr. Jagger and Mr. Cardente are responsible for the violations of the Clean Water Act alleged herein.

The town of Yarmouth, Maine is a person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. The town of Yarmouth owns the Bridge Street Dam, the associated water and flow rights, and the associated fishway. The § 401 Certification requires the fishway to be operational. Yarmouth bears responsibility for ensuring that the fishway it owns and controls is actively managed and maintained in order to be operational. Yarmouth also bears responsibility for ensuring that the Bridge Street Dam, which it owns and controls, complies with minimum flow requirements. Yarmouth is responsible for the violations of the Clean Water Act alleged herein.

LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged herein have occurred and continue to occur at the Bridge Street Dam and fishway on the Royal River associated with the Hydro Project located at the Old Sparhawk Mill, 81 Bridge Street, Yarmouth, Maine, 04096.

DATES OF VIOLATIONS

As outlined above, Defendants have repeatedly failed to comply with the terms of the § 401 Certification since at least 2008. Each instance of the Bridge Street Dam or fishway failing to comply with the terms and conditions of the § 401 Certification is a separate and distinct violation of Section 401 of the CWA, 33 U.S.C. § 1341.

These violations are ongoing and continuous, and barring a change, these violations will continue indefinitely.

RELIEF REQUESTED

Defendants are liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. CLF will seek declaratory and injunctive relief to prevent further violations of the Clean Water Act and such other relief as permitted by law. CLF will seek an order from the Court requiring Defendants to correct all identified violations and to demonstrate full compliance. Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

As detailed above, Defendants have repeatedly violated the express conditions of the § 401 Certification and are reasonably likely to continue to do so. If Defendants do not take remedial action to halt the serious violations of the § 401 Certification described herein, CLF anticipates filing suit 60 days from the date of this notice in the U.S. District Court for the District of Maine, requesting declarative and injunctive relief and the award of costs. During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. To pursue such discussions, please contact Sean Mahoney, Esq. and Emily K. Green, Esq. at the contact information set forth below within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. CLF does not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.



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Sincerely,

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EXHIBIT A



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF

OLD SPARHAWK MILL COMPANY)	MAINE WATERWAY DEVELOPMENT and
Yarmouth, Maine, Cumberland County)	CONSERVATION ACT and
OLD SPARHAWK MILL HYDRO PROJECT)	WATER QUALITY CERTIFICATION
#L-010345-35-A-N)	FINDINGS OF FACT AND ORDER

Pursuant to the provisions of Title 38, M.R.S.A., Section 636 and U. S. Public Law 92-500, Section 401 (as amended), the Board of Environmental Protection has considered the application of OLD SPARHAWK MILL CO. with its supportive data, staff summary, agency review comments, and other related materials on file and finds the following facts:

1. PROJECT DESCRIPTION

The applicant proposes the redevelopment of the existing Bridge Street Dam on the Royal River in Yarmouth, Maine, for the purpose of generating hydroelectric power.

EXISTING:

The dam is located approximately 130 feet upstream from the Bridge Street bridge and approximately 2,000 feet upstream from the head-of-tide line in the vicinity of the I-95 bridge. The concrete dam is approximately 8 feet in height and 140 feet in length and includes a headgate at the east abutment and an operational fishway at the west abutment. A series of abandoned penstock cradles lead from the headgate to the Sparhawk Mill building, where an abandoned turbine room is located.

The dam creates an impoundment with a surface area of approximately 9 acres at a full-pond elevation of 36.6 feet m.s.l. The estimated average annual flow at the project site is 273 cfs from a drainage area of 142 square miles.

PROPOSED:

The applicant proposes to utilize the hydroelectric potential of the existing dam by: rehabilitating the existing headgate and penstock cradles; installing a new steel penstock measuring 7 feet in diameter by 190 feet in length; excavating existing intake and tailrace channels; and installing three turbine-generator units within the mill building, rated at a total generating capacity of 270 KW at a net head of 17.5 feet, and appurtenant equipment. The facility would have a hydraulic capacity ranging from 26 cfs to 240 cfs. Project power would be sold to Central Maine Power Company for distribution.

The applicant proposes to utilize a temporary timber cofferdam and a temporary rock-fill access road to facilitate construction, repair, and excavation activities. Approximately 1,000 cubic yards of gravel and silt are to be excavated from the intake and tailrace areas.

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The applicant proposes to operate the facility as a run-of-river hydroelectric project, with water levels in the impoundment to be maintained at the crest of the dam to the maximum extent possible. Applicant proposes to install such additional upstream and downstream fish passage facilities as may be requested by State and Federal fisheries agencies. Applicant proposes to maintain an instantaneous minimum flow of 35 cfs or inflow to the project area, whichever is less, to be divided as follows: 13 cfs through existing fishway; 17 cfs as additional fishway attraction flow; and 5 cfs through proposed downstream fish migrant facility.

Construction activities are scheduled to begin following the issuance of all required local, state, and federal approvals and to be complete within 12 months.

2. JURISDICTION:

The proposed redevelopment qualifies as the "redevelopment" of a "hydropower project" under the terms of Title 38, M.R.S.A., Section 633.

The project is subject to the jurisdiction of the Federal Energy Regulatory Commission. The applicant has filed an Application for Exemption to construct and operate the Old Sparhawk Mill Project (FERC No. 8417). Water Quality Certification is, therefore, considered, pursuant to Section 401 of the Federal Clean Water Act.

The applicant currently owns in fee or holds a lease to all lands, structures and water rights necessary for the project.

3. FINANCIAL CAPACITY AND TECHNICAL ABILITY:

The total project cost is approximately \$290,000. The applicant has provided a statement from a financial institution indicating an intent to fund the project.

The applicant has retained the services of a number of experienced technical consultants to assist in the design, construction and operation of the project.

4. SAFETY:

No significant project impacts on the safety of the public have been identified.

5. PUBLIC BENEFITS:

The project would result in significant economic benefits to the public in the form of direct construction employment, increased energy security, and increased local, state and federal tax revenues. No significant economic losses to the public have been identified.

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6. TRAFFIC MOVEMENT:

No significant project impacts on traffic movement have been identified.

7. MAINE LAND USE REGULATION COMMISSION:

No part of the proposed project lies within the jurisdiction of the Land Use Regulation Commission; therefore, consistency with LURC zoning is not applicable.

8. ENVIRONMENTAL MITIGATION:

The applicant proposes to realize the environmental benefits and to mitigate or avoid the adverse environmental impacts of the project by: maintaining stable water levels in the impoundment; maintaining a minimum flow from the dam of 35 cfs or inflow, whichever is less; maintaining adequate flow in the existing fishway; maintaining attraction flow to the existing fishway; installing an upstream fish screen in the tailrace to guide migrating fish to the fishway; installing a downstream fish screen and passage facility; and implementing appropriate erosion and sedimentation control measures.

The applicant has not submitted any specific plans for the disposal of construction and excavation spoils.

9. ENVIRONMENTAL AND ENERGY CONSIDERATIONS:

A. NATURAL ENVIRONMENT; WATER QUALITY:

The Roval River is currently classified as having Class B-2 water from its origin to the head of tidewater. The project waters are thus judged to be suitable for recreational boating and fishing, for fish and wildlife habitat and for other uses including water contact recreation.

The estimated 7 day average low flow which has a 1 in 10 year recurrence interval (7Q10) at the project site is 24 cfs.

No significant project benefits to soil stability, water quality, coastal or inland wetlands, or the natural environment of the river have been identified.

The project could result in significant harm to water quality and the natural environment unless a) water levels and flows are adequate to maintain existing water quality standards and designated uses and b) adequate measures are taken to dispose of construction and excavation spoils.

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B. FISH AND WILDLIFE RESOURCES:

The Royal River currently supports a number of warm water and cold water fish species, including brook trout, brown trout, smallmouth bass, eel, alewives, and American shad. Wildlife species that are common to the southern coastal Maine area are likely to be inhabitants or transients in the project area.

The Department of Marine Resources (DMR) is engaged in an on-going program to restore anadromous fish species to the Royal River. Currently, migrating alewives are trapped at the existing fishway and are trucked for stocking in other rivers, primarily the Little Androscoggin, as well as in the Royal River. In addition, DMR has been stocking American shad in the Royal River since 1978, and a natural run of spawning shad has been established in the tidal river downstream from the dam.

The Department of Inland Fisheries and Wildlife has been stocking brown trout in the Royal River since 1976 in an attempt to develop a sport fishery for adult sea-run brown trout.

The Atlantic Sea Run Salmon Commission has an long-term goal of restoring Atlantic Salmon to their historic habitat in the Royal River drainage.

Currently, the project dam provides both upstream and downstream passage opportunities for migrating anadromous fish.

No significant project benefits to fish and wildlife resources have been identified.

The project could result in significant harm to fish and wildlife resources unless a) water levels and flows are adequate to maintain the aquatic environment, b) adequate upstream and downstream fish passage facilities are provided, and c) adequate measures are taken to control erosion and sedimentation during and following project construction.

C. HISTORIC AND ARCHAEOLOGIC RESOURCES:

The Old Sparhawk Mill building has been deemed eligible for listing on the National Register of Historic Places.

No significant project impacts on historic or archaeological resources have been identified.

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D. PUBLIC RIGHTS OF ACCESS AND USE:

Currently, the river in the project area receives substantial canoeing, fishing, and passive recreational use. Existing recreational facilities include a municipal day-use park along the western shore of the project impoundment.

No significant project impacts on public recreational access to and use of the Royal River have been identified.

E. FLOOD BENEFIT/FLOOD HAZARD:

No significant project impacts on existing flood plains or flood flows have been identified.

F. ENERGY BENEFITS:

The project would result in hydroelectric energy benefits in that the project would increase in-state hydroelectric generating capacity by 270 KW and would generate an estimated average annual energy output of 1,000,000 KWH, potentially displacing 1,667 barrels of oil or 463 tons of coal annually.

BASED on the above Findings of Fact, the Board concludes that the proposed OLD SPARHAWK MILL HYDRO PROJECT will satisfy the requirements of Title 38, M.R.S.A., Section 636 and U. S. Public Law 92-500, Section 401, for the issuance of a Maine Waterway Development and Conservation Act Permit and Water Quality Certification in that:

1. The applicant has the financial capacity and technical ability to undertake the project.
2. The applicant has made adequate provisions for protection of public safety.
3. The project will result in significant economic benefits to the public.
4. The applicant has made adequate provisions for traffic movement.
5. The project is not within the jurisdiction of the Maine Land Use Regulation Commission.
6. The applicant has made reasonable provisions to realize the environmental benefits and mitigate the adverse environmental impacts of the project provided that:

A. Water levels are maintained at spillway crest elevation;

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- B. A minimum flow of 50 cfs or inflow, whichever is less, is maintained from the dam at all times, except that for the periods from May 1 to July 15 and September 1 to November 30, a minimum flow of 70 cfs or inflow, whichever is less, is maintained from the dam;
 - C. Adequate upstream and downstream fish passage facilities are constructed and are operational concurrent with the commencement of project operation; and
 - D. Adequate measures are taken to control erosion and sedimentation during construction and operation of the project.
7. The advantages of the project are greater than the direct and cumulative impacts over the life of the project provided that the project is constructed and operated in accordance with the terms of Conclusion #6.

THEREFORE, the Board APPROVES the application of OLD SPARHAWK MILL CO. to construct and operate the OLD SPARHAWK MILL HYDRO PROJECT in YARMOUTH, Maine, and GRANTS certification that there is a reasonable assurance that the activity will not violate applicable Water Quality Standards, subject to the following conditions:

1. Except as irreconcilably limited by inflows to the impoundment, by temporary abnormal operating conditions, by unit operation or interruption under power supply emergencies, or by order of state, local or federal authorities, where all such conditions are beyond the applicant's control, and commencing with project operation, water levels in the impoundment shall be maintained at elevation 36.6 feet.
2. Except as irreconcilably limited by order of state, local or federal authorities, and commencing with project construction, an instantaneous minimum flow of 50 cfs, or a flow equal to inflow when such inflow is less than 50 cfs, shall be maintained from the dam at all times, except that for the periods from May 1 to July 15 and September 1 to November 30 annually, an instantaneous minimum flow of 70 cfs, or a flow equal to inflow when such inflow is less than 70 cfs, shall be maintained from the dam. First priority to a flow of 13 cfs shall be provided to the fishway. The applicant must submit the specific details of a plan to monitor flows and to comply with this minimum flow requirement prior to project operation or within 1 year of the issuance of this permit, whichever comes first. Such a plan shall be reviewed and must receive approval of the Commissioner prior to project operation.
3. The applicant shall take all necessary measures to insure that its activities and the activities of its agents do not result in measurable erosion of soils on the site during the construction and operation of the project. The applicant must submit the details of a plan to securely dispose of all construction and excavation spoils prior to project construction or within 1 year of the issuance of this permit, whichever comes first. This plan shall be reviewed and must receive approval of the Commissioner prior to project construction.

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4. Fish passage facilities for screening downstream migrating fish from the intake structure and for excluding upstream migrating fish from the tailrace channel shall be constructed and shall be operational with the commencement of project operation. The applicant must submit final design and construction plans for these facilities prior to project operation or within 1 year of the issuance of this permit, whichever comes first. These plans shall be reviewed and must receive approval of the Department of Marine Resources and the Commissioner prior to project operation.
5. The applicant shall notify the Department of the completion of project construction and the commencement of operation within 10 days following such completion and commencement.
6. This approval is limited to and includes the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. All variances from the plans and proposals contained in said documents are subject to the review and approval of the Department prior to implementation.
7. The applicant shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation.
8. A copy of this permit must be included in or attached to contract bid specifications for the project.
9. Construction shall commence with 2 years from the date of the granting of this approval unless a license has been issued for the project within 2 years by the Federal Energy Regulatory Commission, in which case construction shall commence in accordance with the terms of that license.

If construction is not commenced within the authorized period of time, as is applicable, this approval shall lapse and the applicant shall reapply to the Board for a new approval. The applicant may not commence construction of the project until a new approval is granted. Reapplications for approval shall state the reasons why the construction was not begun within the authorized period of time, as is applicable, and the reasons why the applicant will be able to begin construction within 2 years from the date of the granting of a new approval, if such approval is granted. Reapplications for approval may include information submitted in the initial application by reference.

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10. If construction of the project upon the terms and conditions hereof is not completed and the operation of the project is not commenced within 5 years from the date of the granting of this approval, the Board may reexamine its approval and impose such additional terms or conditions or prescribe such other necessary corrective actions as it deems necessary to respond to significant changes in circumstances which may have occurred within the 5 year period.

DONE AND DATED AT AUGUSTA, MAINE, THIS 28TH DAY OF NOVEMBER, 1984.

BOARD OF ENVIRONMENTAL PROTECTION

BY: 
SAMUEL M. ZAITLIN, Chairman

PLEASE NOTE ATTACHED SHEET FOR APPEALS PROCEDURES.....

